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# Democratic Governance, Distributive Justice and Development

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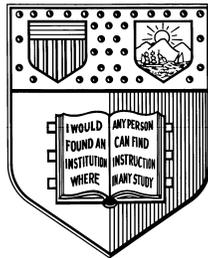
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# CORNELL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES



### **Democratic Governance, Distributive Justice and Development**

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**Chantal Thomas\***  
***Democratic Governance, Distributive Justice and Development***

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**ABSTRACT**

*This paper explores the idea that distributive justice in the multilateral trade regime is best served, at the moment, by democratizing its governance procedures.*

*Part I of this paper focuses on the explanatory question – from a trade and development perspective, how can we understand the breakdown in Doha negotiations? This paper draws attention to institutional dynamics exacerbating the current stalemate. In answering that question, Part I draws from two disparate methodological traditions, which can be described as “economistic” and “constructivist.” Constructivist analysis suggests a focus on the discursive subtexts that constitute the identity and interests of participating states. With that focus, it becomes clear that a variety of discursive contradictions have intensified over recent years, deeply destabilizing the WTO as a context for deliberation and political resolution. Economistic analysis, as applied here, focuses on the transaction costs confronting institutional coordination.*

*Beyond the explanatory perspective, however, some normative inquiry into the basis for a proceduralist approach is desirable, especially when illustrious recent applications of moral theory to distributive justice have called for the institutionalization of strong substantive principles. Part II will consider two substantive arguments for distributive justice, in the context of the multilateral trade regime: Frank Garcia’s argument for S&D as a Rawlsian application of the “international difference principle”; and Carol Gould’s call for human rights, and especially social and economic rights, as a basis for grounding global economic justice.*

*Part III studies emerging “equality jurisprudence” in the GATT/WTO. The “legalization” of the trade regime has resulted in the adoption of an equality, or non-discrimination, doctrinal foundation for the judicialized decision-making of the dispute settlement wing of the WTO, over and above the “reciprocity” model that characterizes WTO negotiations.*

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*Democratic Governance, Distributive Justice and Development*

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### **Introduction: Democratic governance as proceduralist distributive justice**

This paper explores the idea that distributive justice in the multilateral trade regime is best served, at the moment, by democratizing its governance procedures.

This idea of a proceduralist theory of distributive justice is both normative and explanatory. The complexity of trade policy, especially in relationship to economic development, problematizes an agenda of “constitutionalization” – whether the substantive principles at issue are conventional GATT/WTO disciplines, Special and Differential Treatment (S&D) or social and economic rights. The complexity of trade policy and the still attenuated legitimacy of the multilateral regime also help to explain why the WTO *is* now in the very process of attempting to democratize governance amongst Members – and why that process has been so fraught with difficulty. A proceduralist theory of distributive justice allows for a focus on the basic legitimacy of the regime.

The WTO has run, for most of its history, according to a “club model” in which important policies and decisions were dictated by the powerful elite of participating states.<sup>1</sup> The limitations of the club model, and the challenges it posed to the WTO’s legitimacy, came to light during the “Battle in Seattle” during the WTO’s 1999 Ministerial Conference.<sup>2</sup> Since Seattle, the WTO has struggled to find new ways of including developing-country government participation.

Yet it hardly needs to be stated that chronic stagnation and stalemate in WTO negotiations, from precisely Seattle onwards, have severely challenged the multilateral trading regime. Moreover, the increase in developing-country government participation has not resulted in clear policy shifts in line with “S&D.” Rather, the results have been mixed. In some cases, such as intellectual property, important gains such as the WTO decisions on public health and access to medicines have been made. In other cases, such as agricultural negotiations, no clear reform has emerged.

One challenge is to elucidate the reasons for those difficulties. Obviously, the number of participating governments, and the complexity and political sensitivity of the issues at hand, are all central reasons for the stalemate. WTO membership now exceeds many times over the small group of fewer than 30 governments who participated in the GATT’s inception. Moreover, the WTO now seeks to tackle issues, such as agriculture and services, far beyond the GATT’s traditional range. Political resistance to trade

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<sup>1</sup> Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Roger B. Porter et al. eds., 2001).

<sup>2</sup> Cf. Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (1999) (published by Public Citizen), 138.

concessions, unsurprisingly, has intensified accordingly.

Such immediately apparent constraints do not exhaust the inquiry, however. Part I of this paper focuses on the explanatory question – from a trade and development perspective, how can we understand the breakdown in Doha negotiations? This paper draws attention to institutional dynamics exacerbating the current stalemate.

In answering that question, Part I draws from two disparate methodological traditions, which can be described as “economistic” and “constructivist.” Constructivist analysis suggests a focus on the discursive subtexts that constitute the identity and interests of participating states. With that focus, it becomes clear that a variety of discursive contradictions have intensified over recent years, deeply destabilizing the WTO as a context for deliberation and political resolution. Economistic analysis, as applied here, focuses on the transaction costs confronting institutional coordination. Drawing attention to recent examples in negotiations on intellectual property and agricultural trade, this analysis helps to show why differentiation amongst developing countries has become such a challenge to reaching resolution in negotiations.

Beyond the explanatory perspective, however, some normative inquiry into the basis for a proceduralist approach is desirable, especially when illustrious recent applications of moral theory to distributive justice have called for the institutionalization of strong substantive principles. Professor Frank Garcia’s argument for S&D as a Rawlsian application of the “international difference principle” provides an important example. Another important intervention has come from Professor Carol Gould’s call for human rights, and especially social and economic rights, as a basis for grounding global economic justice.

Part II will consider these substantive arguments for distributive justice, in the context of the multilateral trade regime. Here, the paper examines the Rawlsian analysis in Garcia’s account and suggests an alternative reading of Rawls on distributive justice. Essentially, the argument is that far less is understood about trade and development policy than about those “core” political or economic entitlements that would form part of Rawls’s just society. Consequently, harm would arise were any particular set of trade policies – whether special and differential treatment, or conventional “mainstream” WTO rules – to be converted to rights.

Even if social and economic rights were to be adopted as a substantive framework for applying international economic law in the trade regime, their indeterminacy would eventually require a return to democratic deliberation in order to elucidate specific applications. In considering Gould’s call for social and economic rights, this paper suggests that, at least in the GATT/WTO context, proceduralism should be morally predicate to rights in articulating global distributive justice.

The indeterminacy analysis carries over into a study of emerging “equality jurisprudence” in the GATT/WTO, considered in Part III. The “legalization” of the trade regime has resulted in the adoption of an equality, or non-discrimination, doctrinal foundation for the judicialized decision-making of the dispute settlement wing of the WTO, over and above the “reciprocity” model that characterizes WTO negotiations. The embrace of “substantive equality” in this context, however, has not yielded the policy gains anticipated by developing-country governments. The unlikelihood of sustainably impressing developing-country views on WTO jurisprudence through the dispute settlement process makes understanding the reasons for the current breakdowns of the Doha Development Round all the more important.

### **Part I: Why aren’t the relatively democratized current negotiations in the WTO working?**

Few today would dispute the premise, once controversial amongst scholars of international relations, that states will often seek to coordinate their behavior and interests through institutions and that, consequently, international institutions can be analyzed as mechanisms for cooperation. Global governance studies rest precisely on this foundational maxim.<sup>3</sup>

The WTO exemplifies the institutionalist claim – it represents a massive effort to coordinate state behavior on economic policy. Moreover, the mechanism for coordination has progressed from the traditional “green room” model in which the powerful Northern countries cut the deal for everybody else, to a more inclusive approach in recent years.

The perception of legitimacy arises not only from moral discourse, but from frank assessments of institutional efficacy. From Weber onward, institutional legitimacy has been identified as a key aspect of institutional functionality.<sup>4</sup> In other words, legitimacy forms the ground on which an institution operates.

If globalization inheres in “the intensification of social relations which link distant bodies in such a way that local happenings are shaped by events occurring many miles away and vice versa,”<sup>5</sup> according to “one of the most influential definitions of globalization in the literature on the subject,”<sup>6</sup> then the basis for concerns about legitimacy become clear. The more abstract or remote the institution, the more

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<sup>3</sup> See, e.g., Robert O. Keohane & Joseph S. Nye, Introduction, in *Governance in a Globalizing World* (Joseph S. Nye and John D. Donahue eds., 2000), 19.

<sup>4</sup> Thomas M. Franck, *Legitimacy in the International System*, 82 *Am. J. Int'l L.* (1988), 705, 709.

<sup>5</sup> Anthony Giddens, *The Consequences of Modernity* (1990), 64.

<sup>6</sup> Justin Rosenberg, *The Follies of Globalization Theory* (2000), 118.

attenuated the basis for trust in it – what Giddens calls “ontological security.”<sup>7</sup> Thus, if private international economic law (*lex mercatoria*) features a paradoxical proliferation of legal normativity and validity without institutions,<sup>8</sup> public international economic law in the WTO may arguable feature the precise converse: highly salient institutions without a corresponding perception of valid legal normativity.

This observation points to a methodological directive. If perceptions of legitimacy affect institutional effectiveness, then social analysis which can identify the sources of, or obstacles to, institutional legitimacy becomes very useful. Social perceptions of institutions, in this sense, directly affect their authoritativeness. If social perceptions are a form of “shared knowledge,” then institutional structures are channels for and manifestations of the distribution of social knowledge and ideas.<sup>9</sup>

### **A. The social construction of state identity and interests**

Against the traditional dichotomy in international relations of idealism and interest-based realism, constructivist analysis holds that ideas are not opposed to, but rather *constitutive* of, power and interest in determination of state and interstate behavior.<sup>10</sup> Recalling Weber’s classic formulation that “ideas have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest,”<sup>11</sup> constructivism looks for how institutional function rests partially on how power and interest within that institution are conceived.

A constructivist analysis of challenges to democratic governance in the WTO would consequently look into the discursive construction of the institution’s goals and actors. A passage in Alexander Wendt’s canonical *Social Theory of International Politics* offers a useful starting point:

When Neorealists offer multipolarity as an explanation for war, inquire into the discursive conditions that constitute the poles as *enemies rather than friends*. When Liberals offer economic interdependence as an explanation for peace, inquire into the discursive conditions that *constitute states with identities that care about free trade and economic growth*.<sup>12</sup>

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<sup>7</sup> Anthony Giddens, *The Consequences of Modernity* (1990), 92-113.

<sup>8</sup> Gunther Teubner, “Global Bukowina”: Legal Pluralism in the World Society, in Gunther Teubner ed., *Global Law Without a State* (Dartmouth 1997), 3, 15.

<sup>9</sup> Alexander Wendt, *Social Theory of International Politics* (1999), 20.

<sup>10</sup> Alexander Wendt, *Social Theory of International Politics* (1999), 135.

<sup>11</sup> Max Weber, *Essays in Sociology*, in M. Weber, H. Gerth, & C. W. Mills eds., *From Max Weber* (Oxford University Press edition, 1958), 280.

<sup>12</sup> Alexander Wendt, *Social Theory of International Politics* (1999), 135.

What follows is an exposition of the ways in which the current context for international economic law strays from the “liberal” vision in which states are “friends” who “care about free trade.” Instead, contradictions abound, both within the WTO and in the international environment more generally, that destabilize these cornerstones of institutional culture.

*Discursive Contradictions Posed by Developed-Country Mercantilism.* First, the embrace of free trade remains deeply assaulted by the protectionism of developed-country governments on issues of domestic or strategic importance, such as agriculture. From tariff peaks limiting imports, to subsidies promoting exports, developed-country practices on agricultural protection fly in the face of WTO norms and indeed constitute textbook examples of mercantilist trade policy. While virtually all governments act inconsistently in trade policy, and especially on this issue, the contradictions are particularly glaring from the leading founders of the GATT/WTO, and those contradictions have managed to survive decades after that founding.

Such contradictions are felt even more strongly where agricultural trade liberalization in developing countries comparatively outdoes that in developed countries, due to promotion through regional or bilateral trade agreements (as in the case of NAFTA and Mexico) or through structural adjustment advised by international financial institutions (as in the case of the IMF and Jamaica). The sheer volume of involved trade magnifies the impact of this contradiction.

Secondly, beyond the surface contradiction, developed-country mercantilism destabilizes the core normative commitment of the WTO to comparative advantage. The principle of comparative advantage in any case ranks among the more counterintuitive in economics because it counsels governments that domestic social gain will result from increasing the presence of foreign competitors.

Governments who truly commit to comparative advantage should presumably be content with unilateral trade liberalization. Yet GATT/WTO trade negotiations have always insisted on reciprocity, and even imbued the concept of reciprocity with quasi-moral overtones.

The behavior of developed-country states therefore calls into question the validity of their own “identities” as “states... that care about free trade” according to Wendt’s definition above. The centrality of reciprocity and the existence of massive and long-term “carveouts” generate powerful countervailing signals.

These mixed signals necessarily must undermine the “ontological security” that can be attributed to the GATT/WTO regime. Instead they convey a great deal of ambivalence by the leading states about the validity of the presuppositions that support

the WTO. Such ambivalence must in turn affect the willingness of developing-country states to embrace identities that “care about free trade.” The legitimacy of the WTO as an institutional system must struggle with this widespread evidence of mercantilism in the form of efforts to game negotiations so that import liberalization is minimized and export supports are maximized. In short the goals of the system are constantly thrown into question, destabilizing the ground for institutional advancement and legitimacy.

*Discursive Contradictions Posed by National Security and Border Measures.* Wendt’s formulation contrasts a war relationship, in which hostile states are constructed as enemies rather than friends, with a peacetime economic relationship in which states are implicitly constructed as friends rather than enemies. Yet this construction, too, is powerfully contradicted by mixed signals generated by developed country states.

Particularly post-9/11, international affairs have become heavily influenced by a “friend-enemy” distinction<sup>13</sup> that ranges from Samuel Huntington’s explicit “clash of civilizations”<sup>14</sup> to the somewhat more subtle distinction by liberal international relations theory between democratic and non-democratic states.<sup>15</sup>

The friend-enemy distinction as a basis for action also directly contradicts the implicit constraints on sovereignty and emphasis on international rule of law that are signified by multilateral institutions. If state action is determined by the identification of friends or enemies, then this determination becomes the basis for sovereignty and necessitates the capacity to contradict or disobey established principle.<sup>16</sup>

The rise of biopower and border control in the global North underscore the centrality of this friend-enemy distinction<sup>17</sup> in shaping the perception of the global South as a source of threat rather than a friendly co-participant in economic interdependence. “Fortress Europe,” the increasingly enthusiastic use by US immigration authorities of bioinformatics, the steadily growing difficulty that nationals from the global South face in procuring travel or business visas to the global North – all these create a context that, while certainly not on the table at WTO negotiations, must necessarily form part of the background. That background reveals a dichotomy between “open markets” and “closed borders” that belies a destabilizing absence of trust.<sup>18</sup>

“The daily life of international politics is an on-going process of states taking identities in relation to Others, casting them into corresponding counter-identities, and

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<sup>13</sup> Tracy B. Strong, Foreword, Carl Schmitt, *Political Theology* (2005), xx.

<sup>14</sup> Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (1998).

<sup>15</sup> E.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, *International Organization* (Autumn 1997).

<sup>16</sup> Carl Schmitt, *Political Theology* (2005).

<sup>17</sup> Giorgio Agamben, *State of Exception* (trans. Kevin Attell, 2005), 3-4.

<sup>18</sup> Peter Andreas, *U.S.–Mexico: Open Markets, Closed Borders*, *FOREIGN POLICY*, Summer 1996, at 51.

playing out the result.”<sup>19</sup> If perceived gains from trade with those “others” are heavily counterbalanced by concerns about sovereignty and security from external threat, then the viable constitution of power and interest within a model of interdependence that could provide the heavy support for difficult, protracted and complex negotiations is limited.<sup>20</sup>

*Discursive Contradictions and Challenges for Legitimation through Deliberation.* If shared deliberation is to form a central basis for legitimacy, then discourse must also be shared.<sup>21</sup> The argument presented above is that these subtexts undermine the implicit assumptions that must support trade negotiations, namely that there is some tolerable level of friendliness and commitment to free trade across state participants. They inhibit the fostering of “ontological security” necessary to form shared vocabularies.

Accordingly, if this constructivist analysis is correct, there will have to be some transformation in the way in which state identities and interests are constructed in the present environment. It may not be possible, however, to overcome the countervailing forces of mercantilism and national security.

## **B. Transaction costs in institutional coordination**

Even if it were possible to overcome the countervailing forces of mercantilism and national security in order to stabilize the WTO’s basic institutional environment, an additional set of institutional challenges would arise for developing-country governments in particular in the coordination of policy interest.

Joel Trachtman has offered the most succinct and productive framework for economic analysis of international law.<sup>22</sup> Applying insights from institutional economics, Trachtman has demonstrated how international lawmaking can be understood by focusing on transaction costs that freight the negotiation of rights and obligations.<sup>23</sup>

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<sup>19</sup> Alexander Wendt, *Social Theory of International Politics* (1999), 20.

<sup>20</sup> “The free movement of people, ideas – and merchandise, of course – is important and has contributed enormously to the positive change in the recent decade. But if that outside world also, to many, is seen as a *threat*, the political forces are fishing in murky waters and looking at *migration and crime and so forth coming from that dangerous outside*, then we are in trouble.” H.E. Jan Eliasson, *The Progress of UN Reform*, Speech to Carnegie Council, June 7, 2006 (as part of “A Fairer Globalization” series) (emphasis added).

<sup>21</sup> Jürgen Habermas, *Between Fact and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996), 299, 300 (“democratic will-formation has the exclusive function of legitimating the exercise of political power. . . . the procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sluices for . . . discursive rationalization” and institutional legitimation).

<sup>22</sup> Joel Trachtman, *The Economic Structure of International Law* (2008).

<sup>23</sup> See Joel Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 *Virginia Journal of International Law* (2001), 1, 51 (stating that rules cost more to develop than standards); see also Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard International Law Journal* (1999), 333, 350-56.

With Trachtman's perspective in mind, generic categories of transaction costs that would affect multilateral trade negotiations include information costs (the effect that gaps in information and capacity have in producing suboptimal rules), specification costs (the time and effort required to bring all parties to agreement about specific language); strategic holdout costs (the risk that some negotiating states will act opportunistically to refrain from providing their anticipated consent, in order to wring additional concessions from counterparties anxious to gain closure); "ordering" costs (skewing of negotiations that reflect the order in which preferences are expressed);<sup>24</sup> and capture (costs resulting from "suboptimal" rules that skew to a particular set of interests within the negotiating state's territory, thereby skewing overall negotiations).

*Coordination Challenges in WTO Negotiations by Developing-Country Governments.* The general coordination difficulties described in the preceding paragraph must be considered in tandem with more specific sources of developing-country governments' collective action problems in WTO negotiations. Two such challenges can be immediately recognized. First, the number of developing-country participants has increased vastly over time, magnifying associated coordination gains. Secondly, crucial challenges to capacity-building remain, which have been extensively described in trade law and policy literature.<sup>25</sup>

Two additional challenges will be mentioned here: firstly, economic differentiation amongst developing countries, and secondly, the rise of parallel regional and bilateral tracks for trade negotiations.

*Economic differentiation amongst developing countries.* The differences in income level and quality of life amongst "developing countries" has, for example, resulted in differentiations in statistical publications such as the UN Human Development Index between "high human development" (Mexico, Mauritius), "medium human development" (Grenada, Guyana), and "low human development" (Nigeria, Nepal).<sup>26</sup>

Such differentiations can affect trade negotiations. For example, on the question of whether S & D should be accorded equally to all developing countries, or instead accorded on a sliding scale, governments may well differ based on where their economies would rank in such a calculus. In the WTO agriculture negotiations, talks over the parameters of the "Development Box" have featured proposals for a more relaxed, open-ended S&D provision that would not draw distinctions based on level or type of

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<sup>24</sup> Cf. Kenneth Arrow, A Difficulty in the Concept of Social Welfare, 58 *Journal of Political Economy* (1950), 328–346. Arrow's impossibility theorem proves this to be true even without the assumption of structural bias in the ranking and order of recognition of country preferences which would apply in the WTO developed country-vs-developing country context.

<sup>25</sup> See, e.g., Gregory Shaffer, Can WTO Technical Assistance and Capacity Building Serve Developing Countries? 23 *Wisconsin International Law Journal* (2006), 643-686.

<sup>26</sup> UN Human Development Report, Human Development Index (2007/2008).

development. Others have proposed additional protections for least developed countries, or for countries deemed to be particularly vulnerable for one reason or another to liberalized agricultural trade.

“Holding the line” to a particular position would be difficult amongst such a range of concerns. The difficulty in maintaining a collective line becomes further pronounced as WTO trade negotiations proceed on any given issue, even in the more inclusive post-Seattle formats. This is because developing country coalitions will typically rely, for efficiency’s sake, on “core” countries to represent the coalition’s position. The larger developing economies tend to prevail in such streamlined negotiations. In the spectrum from the old “club model” to a one-state, one-vote model, this scenario amounts to a slightly more inclusive club:

The proliferation of coalition representation in the green room has improved some aspects of the internal transparency of WTO decision-making, but far from all. Indeed, since the conclusion of the July Package in 2004 much of the focus of consensus-building has shifted to small group discussions between the G-6 (EU, US, Japan, Australia, India and Brazil) and the G-4 (EU, US, India and Brazil), excluding the vast majority of developing countries and their coalitions. These developments seem to affirm . . . earlier claims that the key challenge for WTO decision-making will continue to centre on an ‘insider-outsider’ divide, rather than a ‘North-South’ divide, whereby only a handful of developed and major developing countries are included in key deliberations.<sup>27</sup>

Such differentiation takes on additional complexity based on the specific coalitions that form across or even within sectors. Again taking agricultural negotiations as an example, small island developing states in the WTO have articulated a collective position emphasizing preferential, non-reciprocal tariffs for developing countries over generalized market liberalization. This emphasis stems from the reliance of many small island developing economies on GSP trade preference schemes and the like.<sup>28</sup> In this

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<sup>27</sup> Mayur Patel, *New Faces in the Green Room*, Global Trade Governance Project, GEG Working Paper (2007), 19 (available at: <http://www.globaleconomicgovernance.org>) (internal citations omitted).

<sup>28</sup> World Trade Organization, *WTO Agriculture negotiations: The Issues, and Where We Are Now* (2004), 61-62.:

Many developing countries complain that their exports still face high tariffs and other barriers in developed countries’ markets and that their attempts to develop processing industries are hampered by tariff escalation (higher import duties on processed products compared to raw materials). They want to see substantial cuts in these barriers.

respect, the position on S&D articulated by the CARICOM countries<sup>29</sup> (small island developing states) contradicts, for example, that of the larger developing economies that participate in the Cairns Group, a coalition that spans the developed-developing country divide.<sup>30</sup>

*Parallel Tracks for Trade Negotiations.* The rise of regional and bilateral trade agreements has become a widely observed phenomenon, e.g. “124 bilateral and regional trade agreements were concluded in the 48-year GATT regime and 196 bilateral and regional trade agreements have been concluded since during the first eleven years of the WTO regime... Nearly 40 percent of total global trade now takes place under bilateral and regional trade agreements.”<sup>31</sup>

The difficulty that such parallel tracks would pose for collective action is manifest. Any preexisting imbalance in power that could be corrected through collective action in a multilateral setting may be exacerbated in a bilateral or regional context.<sup>32</sup>

Intellectual property negotiations provide a good example of this dynamic. In the WTO context, developing country governments, led by the African Group coalition, were able to achieve a clarification of TRIPs that supports a more relaxed and open-ended interpretation of its compulsory licensing provisions. These negotiation efforts resulted in the Doha Declaration on TRIPs and Public Health – one of the few concrete outcomes of the Doha Round – and a further clarification of in the WTO General Council’s 2003 decision on “paragraph 6” of the Doha Declaration.<sup>33</sup> By contrast, bilateral and regional trade agreements between developed and developing countries often feature “TRIPs Plus” provisions that are more restrictive than those found in the WTO regime.

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On the other hand, some smaller developing countries have expressed concerns about import barriers in developed countries falling too fast. They say they depend on a few basic commodities that currently need preferential treatment (such as duty-free trade) in order to preserve the value of their access to richer countries’ markets. If normal tariffs fall too fast, their preferential treatment is eroded, they say.

<sup>29</sup> CARICOM proposal, WT/G/AG/NG/W/100. The CARICOM countries are Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, and Suriname.

<sup>30</sup> The Cairns Group has had 19 members since 2006: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Peru, Philippines, South Africa, Thailand, and Uruguay. See the Cairns Group proposals in WT documents G/AG/NG/W/11, 35, and 93.

<sup>31</sup> Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 *Journal of International Economic Law* (2006), 487.

<sup>32</sup> Cf. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *Virginia Journal of International Law* (1997), 639.

<sup>33</sup> Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 *Journal of International Economic Law* (2006) 487, 504.

The TRIPs-plus example also indicates that fragmentation need not be the only consequence of collective action problems manifest in bilateral and regional trade agreements. Indeed, harmonization might be a result of “carving off” individual or groups of developing countries – a dynamic that some have also observed with respect to investor protection clauses in bilateral investment treaties.<sup>34</sup>

*Coordination Problems and Consequences for S & D.* The above section demonstrates that opening up WTO decision-making to more democratic processes will not bring necessarily bring about a clear shift in the direction of a particular approach to development policy, or the S & D principle. Various institutional costs to coordination stem from generic transaction costs to differentiation amongst developing-country interests to coordination across multi-track trade negotiations. These costs mean that, *even if* developing country governments were to gain a clear majoritarian position in WTO governance, complexity in policy decisions on trade and development would continue.

This complexity, however, is precisely why a proceduralist account nevertheless remains necessary. In the absence of universal policy directives, an open-ended dialogue may allow for the greatest possible consideration of disparate views and varied sources of information. Although a democratized negotiation procedure in the WTO may be far from ideal, it may nevertheless provide the surest path to decisions which reflect some semblance of distributive justice for developing countries. The next section considers the normative arguments for a “rights-based” approach to distributive justice in the international economic law context, and seeks to demonstrate why those pathways may ultimately still lead us to proceduralism.

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<sup>34</sup> Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 *Journal of International Economic Law* (2006), 644-655 (describing the reemergence of the Hull rule in BITs). But see United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999* (2000) (UNCTAD/ITE/IIA/2) (finding enormous variation amongst investor protection clauses in BITs).

## **Part II: Why should the focus on democratic governance persist despite these difficulties?**

This section engages in some of the accounts from moral theory of distributive justice in international economic law. The intention is to demonstrate why substantive arguments eventually lead back to the need for a proceduralist account of distributive justice.

### **A. Rawlsian principles as applied to S&D**

Frank Garcia has done more than any other American legal scholar to apply Rawlsian theory to the international trading regime. Garcia's work follows the lead of other global justice philosophers who criticized Rawls for his reluctance to apply his "difference principle" to the international scale.<sup>35</sup> Calling for an "international difference principle," Garcia has argued that the S & D treatment rule can operate as "a partial fulfillment of the redistributive obligations that Justice as Fairness dictates for wealthier states in response to inequality."<sup>36</sup>

Garcia's account illustrates all too clearly that the global economy remains deeply shaped by structural inequality. Garcia could not be on stronger ground when arguing that any international difference principle must consider seriously the regulatory reforms at every level that would be required to correct this inequality. At the same time, at least to my liking, Garcia has not fully addressed Rawls' own preference for procedure over substance as a mechanism for distributive justice *even where the difference principle applies*, as suggested by the analysis above.

In his seminal *Theory of Justice*, Rawls elaborated the "veil of ignorance" that would provide a mechanism for a just society.<sup>37</sup> A just society would be created through its determining the "constitutional essentials," many of which amounted to procedural fairness and what we would identify as civil and political rights.<sup>38</sup>

With respect to social and economic policy, Rawls seems to have shied away from a specific redistributive approach. Rather, he felt concluded that the optimal

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<sup>35</sup> See Thomas Pogge, *Realizing Rawls* (1989), 211-272; Robert Hockett, *The Limits of Their World*, 90 *Minnesota Law Review* (2006), 1720; Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 *Cardozo Law Review* (2005), 1179.

<sup>36</sup> Frank Garcia, *Trade and Inequality*, 21 *Michigan Journal of International Law* (2000), 976.

<sup>37</sup> John Rawls, *A Theory of Justice* (1971). Rawls's social contract is ratified in a condition of perfect equality: They are the principles that rational and free persons concerned to further their own interests would accept in an initial position of equality as defining the fundamentals of the terms of their association, according to two basic principles. "First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." Rawls at 60. Second, "Social and economic inequalities are to be arranged so that they are both: a) to the greatest benefit of the least advantaged, and b) attached to offices and positions open to all under conditions of fair equality of opportunity." Rawls at 60.

<sup>38</sup> John Rawls, *Political Liberalism* (1993).

arrangements are still too uncertain and too unknown to maintain enough confidence to constitutionalize them in any form.<sup>39</sup> Consequently, what is required for social rights is ongoing political dialogue as to their proper scope and application.<sup>40</sup> A “central feature of this conception of distributive justice,” Rawls wrote, is that it contains a large element of *procedural justice*.<sup>41</sup>

It is certainly possible to critique this proceduralist account of distributive justice as simply an artifact of Rawls’s liberal political commitments.<sup>42</sup> Yet, in the context of international trade, the gaps between theory and practical consequence on *both* sides of the spectrum often seem quite stark. Trade liberalization does *not* always equate to economic growth; the experience of the East Asian countries stands as a testament to the possible benefits of an infant-industry approach.<sup>43</sup> Yet an infant-industry, which would benefit from a non-reciprocal, preferential trade policy at the multilateral level, can also backfire. In short, the benefits of a non-reciprocal or preferential trade policy may be too indeterminate at the abstract level, without examining particular instances.

Take the example of just one developing country, Egypt, which unfortunately seems to have undergone trade liberalization where it would create widespread social harm and foregone trade liberalization where it would generate widespread social gain: the leveling of textile trade preferences for Egypt has dislocated massive small-scale local manufacturers; at the same time, a continuing protection of a domestic steel monopoly has forced housing costs beyond affordability.

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<sup>39</sup> See Rawls, *Theory of Justice*, at 258-292 (discussing distributive justice and political economy).

In the context of domestic U.S. jurisprudence, the constitutional scholar Frank Michelman has reviewed Rawlsian justice for whether it calls for the establishment of any specific minimum entitlement. Michelman concludes it does not:

The point for Rawls is this: A sufficient, legitimating constitutional agreement has to provide fully firm, strict, and reliable substantive guarantees of compliance with what he calls the central ranges of the basic negative liberties--freedoms of conscience and expression, for example. Regarding the rest of social citizenship, the requirement is a looser one. What we need, and all we need, is assurance that, whenever political and legislative choices bear upon the basic structural conditions of social citizenship, those choices will be approached by all who take part in them under what Rawls calls a constraint of public reason.

Frank Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 *International Journal of Constitutional Law* (2003), 13.

<sup>40</sup> Rawls, *Theory of Justice*, at 304.

<sup>41</sup> Rawls, *Theory of Justice*, at 304 (emphasis added).

<sup>42</sup> Cf., Alisdair McIntyre, *After Virtue* (1981).

<sup>43</sup> See, e.g., Alice H. Amsden & Wan-wen Chu, *Beyond Late Development: Taiwan’s Upgrading Policies* (2003); Stephan Haggard, *Pathways from the Periphery: The Politics of Growth in the Newly Industrializing Countries* (1995).

In the former case, Egypt received diffuse benefits from a principle of S & D; in the latter case, the same principle has worked to exacerbate domestic rents and corruption. The latter scenario certainly bolsters the anti- S& D view of trade scholars such as Hudec, in whose view and economists. In their view, such mechanisms create too many opportunities for rent-seeking and corruption, and strain the overall legitimacy of the system in the Global North as well as the Global South.

In short, we simply don't yet know the optimal arrangement for trade – even if the benefits of trade are universally recognized. If this is true, then a dialogic model may remain important in the ongoing determination of optimal trade policy.

## **B. Social and economic rights as a basis for ordering international economic law**

In *Globalizing Democracy and Human Rights*, Carol Gould gives a sophisticated argument for developing a framework for the implementation of human rights and democratic governance on a global scale. Gould seeks to develop a stronger basis on which human rights can be required by a theory of justice than would be found in other accounts.<sup>44</sup>

Gould notes that many prevailing theories of justice, including Rawls and Habermas, establish a certain circularity between democracy and justice: on the one hand, democracy is desirable because it will lead to just outcomes, and on the other justice can be identified primarily because it is the result of a democratically deliberative decision-making process.

Consequently, there is no independent basis for identifying justice,<sup>45</sup> and these theorists seek to address the obvious concerns about bias through stipulating ideal conditions for deliberation: Rawls's "veil of ignorance" and Habermas's "ideal speech

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<sup>44</sup> Carol Gould, *Globalizing Democracy and Human Rights* (2004), 31.

<sup>45</sup> *Id.* at 15:

[S]everal theories of justice have themselves framed the principles of justice in terms of some consensus (e. g., Rawls, Habermas), which may seem to put these principles themselves in the context of a quasi-democratic decision procedure. If that is the case, then rights entailed by or derived from these principles of justice might themselves ultimately be social constructs internal to, or constituted by, a democratic or quasi-democratic process and thus not independent of such procedures. It would not be clear, then, why the results of one democratic procedure would have the normative authority to constrain another.

situation.”<sup>46</sup> By contrast, Gould argues that adopting human rights as a *prior* justice commitment would avoid this problem of circularity.<sup>47</sup>

Gould must address in her own rights-based account the problems of power imbalances and other “differentiations” that would shadow a proceduralist account of justice.<sup>48</sup> She resolves this problem by calling for a “concrete universality” that would<sup>49</sup> both recognize the social relationships that both constitute and differentiate individuals, and that would depend on “intersociative norms emerging from ... an interaction”<sup>50</sup> of “peoples and cultures.”

Yet this view also contains its own circularity: rights are an important precursor to effective democracy, but only an effective democracy can ultimately determine the most just definition of rights.

To be sure, Gould offers an extraordinarily rich conception of deliberative decision-making. By proposing a “care model of democratic community,” Gould introduces concepts of empathy, cooperative reciprocity and solidarity that would seem to provide important ballast to her proposal for a “universalizing consensus.”<sup>51</sup> The ultimate point, though, remains: if we reject the possibility of deriving a meaning for justice, or rights, from some *a priori* perspective because we recognize the boundedness of any given vantage point, then some dialogic, deliberative, proceduralist conception of justice is necessary to create acceptable content for itself. Yet this quickly brings us back to the “constitutional circle” that Gould recognized in her critique of earlier accounts. The only way out of this circularity seems to be to posit certain values that are clearly historically specific and therefore not favored in this consciously universalistic

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<sup>46</sup> Rawls and Habermas build on the moral principle of reciprocity between human beings and its universalization into general, abstract norms that form the basis of a just society. The “veil of ignorance” conceals the norm projections of individual rational actors from their particular circumstances and induces them to design fair political institutions. In Habermas’s “ideal speech situation”, formal procedures are supposed to guarantee the undistorted reciprocal expression of individual interests as well as their universalization into morally just norms. See Gunther Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law* (Paper presented at the annual meeting of the Law and Society Association, TBA, Berlin, Germany, July 24, 2007).

<sup>47</sup> “But if we grant that a democratic procedure, however justified, may still arrive at an unjust outcome, then there must be some independent criterion of justice, the appeal to which cannot be, circularly, to a democratic or quasi-democratic procedure in turn.” Gould, *Globalizing Democracy and Human Rights*, at 32.

<sup>48</sup> *Id.* at 61 (“Certainly, there is the important recognition that the interrelations among individuals or groups often have been characterized not by equality among participants but instead by one-sided relations of domination, superiority, or oppression”).

<sup>49</sup> *Id.* at 62 (“a conception of concrete universality that emphasizes networks of social relationships and engagements, where these may involve relations of domination or oppression”).

<sup>50</sup> *Id.* at 63.

<sup>51</sup> *Id.* at 45 (“It is further evident that the concept of democratic community, particularly in view of the care model, goes beyond the traditional and thinner notion of democracy as simply a matter of political representation and equal voting rights.”)

approach.<sup>52</sup>

The indeterminacy of human rights principles thus leads to the need to point to some *prior* set of values for guiding the process of reasoning principles through to conclusions. In the U.S. legal academy, those embracing an antifoundationalist liberal or progressive perspective have ended up stressing the need for democratic deliberation<sup>53</sup> – and particularly on economic and social rights.<sup>54</sup>

### **C. Indeterminacy, social and economic entitlements, and S&D**

The ambivalence of Rawlsian theory for an international S&D framework does not equate to the undesirability of domestic or international socioeconomic entitlements. S&D, however, does not equate to social and economic entitlements. Such entitlements articulate substantive benefits that accrue directly to individuals, whereas S&D identifies governmental practices that do not necessarily produce similar benefits.

It could be argued that S & D is the closest thing to social and economic entitlements in the trading system: S&D would support the creation of monies (through increased market access for exports, tariffs or quota related price increases for imports) that could be used to target business development and/or poverty reduction. However, there is no guarantee that those monies will be used in that fashion. Increasing tariff revenues or producer profits does not ensure social and economic benefits for the larger population.

This is *not* to advance the familiar argument against government intervention that might be found in the writing of Milton Friedman or Robert Hudec.<sup>55</sup> Governments are always involved in shaping markets, and the question is what kind of intervention is optimal. S&D might be optimal in some cases but not in others.

Where the conditions exist to generate economic growth through trade, S & D in the form of preferential tariffs for exports, and tolerance of higher tariffs and trade barriers for imports, should form part of a larger tailored policy for growth. In others, where the conditions exist to transform such protections into

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<sup>52</sup> Cf. Michael Dorf, *The Coherency of Democracy and Distrust*, 114 *Yale L.J.* 1237, 1246-1250 (2005).

<sup>53</sup> Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. Rev.* 875 (2003); Roberto M. Unger, *Democracy Realized: A Progressive Alternative* (2000) (concluding that an “anti-necessitarian” account of law calls for “democratic experimentalism.”).

<sup>54</sup> Frank Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 *Int’l J. Cont. L.* 13 (2003).

<sup>55</sup> Milton Friedman, *Capitalism and Freedom* (1962); Robert E. Hudec, *Developing Countries in the GATT Legal System* (1986).

classic rent-seeking that harms business development/poverty reduction, S&D should not be used.

If the decision is between a broad, open-ended S&D framework that would provide sufficient policy autonomy to individual governments to make these tailored decisions, on the one hand, and a total denial of such autonomy on the other, then policy autonomy is preferable for the reasons just stated. Examples where policy autonomy is important include intellectual property and balance-of-payments restrictions.

In general, though, constitutionalizing any set of substantive *principles in trade policy* would probably lead to undesirable consequences. The argument applied above to caution against focusing on strengthened S&D would apply just as equally to a neoliberal argument for eliminating S&D altogether. There is enough historical evidence pointing to the indeterminate gains from trade to question the efficacy of a simplistic free-trade approach in every context. This uncertainty about the relationship between economic policies and social welfare is the basis for Rawls's initial reluctance to identify "core" values in economic and social principles beyond the stated social goals put forward by the difference principle.

Whereas other commentators would argue for a "constitutionalization" of free trade principles in the WTO, in fact the central goals of the GATT/WTO system have never been articulated in terms of free trade *per se*. Both the GATT and the WTO Preambles stress that the goals of the trading regime are *social welfare outcomes* rather than particular economic policies, stating that:

"relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."<sup>56</sup>

While the particular arrangements detailed under the WTO clearly set out to reduce national policy space in favor of free trade, then, the restraint in endorsing free trade as such is important. It means, effectively, that at the end of the day the particular balance between *free trade and redistributive trade is still open for discussion at the highest level of principle*.

Moreover, the growing body of WTO jurisprudence will not necessitate one or another set of trade policy arrangements. As the next section shows, the emergence of "equality jurisprudence" in the GATT/WTO has operated primarily to secure the

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<sup>56</sup> Preamble, General Agreement on Tariffs and Trade (1947) & Preamble, Agreement Establishing the World Trade Organization (1994).

systemic viability of the Dispute Settlement Body as a legal system, rather than to resolve core questions about trade policy.

### **Part III: “Equality jurisprudence” in the GATT/WTO**

In many of their efforts to advocate the adoption of S&D principles, developing-country governments have pressed a “substantive” conceptualization of sovereign equality. As Professor Lim has noted in his contribution to this conference, the Appellate Body appears to have embraced the concept of substantive equality that historically informed developing-country government mobilization efforts for reform of the international economic order. In the *Indian GSP* case, as Lim also observed, the Appellate Body ruled that special conditionalities on the EC’s GSP arrangements were WTO-consistent as long as “similarly-situated beneficiaries” were “not treated differently.”<sup>57</sup>

The *Indian GSP* case builds on a jurisprudential trend at work in a variety of decisions that the Appellate Body building on a substantive notion of equality. For example, the Appellate Body asserted this reasoning forcefully in its *Shrimp-Turtle I* decision, holding that the purpose of the Article XX chapeau was to ensure that similarly-situated countries (“countries where the same conditions prevail”) would be treated similarly.<sup>58</sup> While *Shrimp-Turtle I* did not focus on S&D directly in the way that *Indian GSP* did, the concept of S&D clearly animated the question of whether the complainant countries in that case should be required to adopt the same relatively costly devices as producers elsewhere with relatively more resources at their disposal.

The emergence of equality as a central concept in driving decisions is a product of the *relative* shift from a “pragmatic” trade regime in which political diplomacy was paramount to a “legalistic” trade regime in which some trade disputes must be decided through a judicial mechanism. This shift is not complete, obviously. However, the establishment of the DSB has created a forum in which claims must be articulated and decided in *legal* terms.

The AB’s conscious adoption of a legalistic approach was evident in its rejection of the EC’s argument in the *Bananas* case for a more “pragmatic” interpretation of the provisions in question. The EC had unsuccessfully sought to persuade the AB that the deal cut during the Marrakesh negotiations created a political understanding that should override any narrower interpretation that might be supported by a stricter attention to

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<sup>57</sup> Para. 69, Report of the Appellate Body, European Communities – Conditions for the granting of tariff preferences to developing countries, WT/DS246/AB/R, 7 April 2004.

<sup>58</sup> Report of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998.

text.<sup>59</sup>

The *EC Bananas* case reveals the *systematization of law* propelled by the WTO's establishment of an adjudicatory mechanism. A desire to maintain integrity in the WTO as a legal system<sup>60</sup> requires that claims be articulated and decided in jurisprudential terms. The concept of "horse-trading" represented by the reciprocity in trade negotiations has no real anchor in law's understanding of itself. Therefore, although reciprocity is not only non-controversial but is actually the central driver of negotiations among WTO Members, it is untenable as a criterion for disposing of legal claims. Hence, the *Bananas AB* rejected the EC's claim animated by reciprocity ("this was the deal we cut in Marrakesh") in favor of an interpretation animated by the jurisprudential principle of equality.

The emergence of "equality jurisprudence" does not constitute victory of any particular view of political economy or any political bloc. Rather, it consolidates the transformation of WTO dispute settlement proceedings from a "power orientation" model to a "rule-orientation."<sup>61</sup> This transformation produced the establishment of the WTO DSB as a self-conscious – and therefore self-reproducing -- *legal system*.<sup>62</sup>

The need to view the *legal system* as valid has necessitated the replacement of "extra-legal foundations" with legal concepts within the dispute settlement jurisprudence. From this perspective, it is not surprising that it is *substantive* equality, rather than a more formalistic concept of equality, that has emerged as a central concept. Whereas a formalistic approach would render the process of adjudication relatively more technocratic, the need to parse the concept of substantive equality requires the primacy of jurisprudential tools and analysis.

Indeed, systems theorists such as Gunther Teubner give as a prime example of legal autopoiesis the "equality clause" in which "reasonable criteria" must be established to determine the applicability.<sup>63</sup> Consequently, the enterprise of law becomes an endless

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<sup>59</sup> Para. 4.104, Page 49, WT/DS27/R/ECU. This argument was successful at the panel level, see *id.* at Para. 7.110, Page 241, but was reversed at the Appellate Body level, see WT/DS27/AB/R, paras. 179-188, Pages 70-71.

<sup>60</sup> Niklas Luhmann, *A Sociological Theory of Law* (Routledge & Kegan Paul edition, Elizabeth King & Martin Albrow trans., 1985); *Autopoietic Law: A New Approach to Law and Society* (Gunther Teubner ed., 1988).

<sup>61</sup> John Jackson, *The World Trading System: Law and Policy of International Economic Relations* 85 (1994).

<sup>62</sup> Autopoietic analysis of law focuses on the law's self-referentiality and recursivity – the way in which legal structures are always and only justified by legal acts, and vice versa. "[T]he circular relationship between legal acts and legal norms . . . replaces extra-legal foundations of law." Teubner, Introduction to *Autopoietic Law*, in *Autopoietic Law: A New Approach to Law and Society* (Gunther Teubner ed., 1988), at 4.

<sup>63</sup> Gunther Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law*, at 11.

process of differentiation between circumstances that produce a ruling of “equal” versus those that produce a ruling of “unequal.”<sup>64</sup>

Systems theory holds that law essentially cannot “understand” political or social facts as such; rather, those facts must be metabolized in the language of accepted jurisprudential concepts. Thus, systems theory holds that law is *normatively closed* to claims for political or economic justice in and of themselves. For example, arguments for outcomes on the basis of economic policy or political theory could not be absorbed by the WTO dispute settlement body in those terms.

“Normatively closed” does not mean determinate or fixed.<sup>65</sup> Because of this encompassing framework of reasoning through legal concepts, however, legal systems are not directly open to direct claims for political justice. Such claims can only be addressed in terms of their articulation in jurisprudential terms. As such, they will ultimately be determined not by their political objectives but by their legal framing.

The *Indian GSP* case would seem to support a systems theory view. Although the “substantive equality” model *was* adopted as a jurisprudential framework by the EU, that adoption did not correlate with a holding in favor of India. Thus, the emergence of a substantive equality test hardly constitutes a clear victory for the “structuralist” agenda for reform of the New International Economic Order<sup>66</sup> propounded by developing-country governments in the 1970s when the GSP was established. Ironically, although the principle of substantive equality drove the argument by developing-country governments for a GSP back then, in the *Indian GSP* case the substantive equality argument was adopted by the EC as respondent.

In sum, a *jurisprudential* approach to distributive justice will remain indeterminate in securing specific economic gains for developing country governments. This means that a *legislative* approach is required to specify what the parameters of GSP should be. Although the purveyors of GSP might argue that sovereignty allows them to determine these political conditionalities for themselves, the GSP is so centrally part of the trade regime that such indicators *should be multilaterally decided*.

## Conclusion

The traditional control of the GATT/WTO by the great economic powers proceeded according to a consensus rule of decision-making as centrally informed by a dynamic of reciprocity or horse-trading in negotiations. While this basic format for trade

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<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Raúl Prebisch, *The Economic Development of Latin America and Its Principal Problems* (New York: United Nations, 1950).

negotiations has not much altered, participation has broadened to include more developing-countries acting singly or, increasingly, in coalitions.<sup>67</sup> Thus, progress has been made in terms of equalizing participation by developing countries.

Democratic governance in the WTO requires further reforming its negotiating and legislative processes to allow for broader and more meaningful inclusion of developing-country governments.<sup>68</sup> Ideally, democratization reforms would comprise two components: first, sovereign equality in state participation, e.g. one-state, one-vote; and second, sufficient technical assistance and capacity-building so as to make voting meaningful for all states.

Between this ideal and contemporary reality, of course, many gradations exist. Short of one-state, one-vote procedural equality, greater support for government negotiation coalitions to assert their interests effectively in negotiations, and for a broader range of states to be included at earlier stages in negotiations.

Over the past decade, such networks of coalitions have formed in the WTO, both amongst developing-country governments, and between developed and developing countries. Technical assistance programs for developing country negotiators have become programmatized by a variety of actors including the WTO, bilateral donors, and non-governmental organizations. Developing-country governments have participated much more extensively in negotiations.

These efforts at inclusiveness have fallen far short of the mark. Large gaps in capacity still exist amongst WTO Members. Negotiations most assuredly do not reflect an equitable representation of the range of views amongst the membership. Even though these increases in inclusiveness have been limited, however, they have still been associated with a freezing-up of negotiations.

Like many international institutions, the perceived legitimacy of the WTO has been called into question by the widespread increase in the salience of globalization in the social consciousness.<sup>69</sup> This increased awareness also happened to correlate with an actual expansion of the multilateral trade regime's substantive and institutional power via the Uruguay Round, causing some to wonder whether the democratic deficit so decried in

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<sup>67</sup> See Mayur Patel, *New Faces in the Green Room*, Global Economic Governance Working Paper, at 19; see also *infra* Part. II.B.

<sup>68</sup> See Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System – A Cosmopolitan Perspective*, 8 *Journal of International Economic Law* 363 (2005); see also Jeffery Atik, "Democratizing the WTO," *George Washington International Law Review* 451 (2001) ("Symposium: Global Trade Issues in the New Millennium").

<sup>69</sup> Arguably the change has not been as great as perceived, and certainly not for developing countries.

the European context might also inhibit the legitimacy of international trade law.<sup>70</sup>

This paper engaged in both institutional and discursive analysis to investigate why that progress has been insufficient to overcome the continued breakdowns in the Doha talks, mining below the surface to unearth faults in the “deep structure” of the multilateral trading regime. Those causes have to do not only with clear clashes of material interests and logistical coordination challenges directly at issue in the negotiations, but also with an underlying lack of trust that is revealed and reinforced by a discourse that constitutes state participants in the negotiations as “enemies” rather than “friends.”<sup>71</sup>

What ongoing difficulties in the Doha Development Round present for democratic governance in the WTO? Two methodological approaches were considered, “economistic” and “constructivist,” in identifying challenges to democratic governance in the WTO. The constructivist analysis pays attention to the breakdown of trust stemming from discursive contradictions in state identity formations both within and beyond the WTO. The economistic analysis identified the multiple sources of transaction costs in negotiations, drawing attention to recent examples in negotiations on intellectual property and agricultural trade.

This paper also endeavored to show why, from a normative perspective, a focus on democratic governance might prevail over substantive theories of distributive justice. Far from opening the door to nihilism, recognition of the indeterminacy of egalitarian principles implies the need for continued deliberation.<sup>72</sup> For this reason, the rise of “equality jurisprudence” in the WTO cannot by itself answer important questions about the parameters of development policy in the WTO, for example in the context of applying the Special and Differential Treatment principle. The parameters of those principles are best answered through democratic decision-making.

There are several observations to be made about this argument’s relationship to larger debates on justice in international economic law. First, the emphasis on participatory decision-making runs contrary to a very strong preference in economic law and policy for “expertise” -- “technocracy” over democracy, as it were. This paper aligns with skeptics of “constitutionalizing” either the substantive or institutional commitments of the WTO.<sup>73</sup> The welfare effects of specific configurations in trade law and policy, it is argued, remain sufficiently unknown as to call for “democratic experimentalism” rather

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<sup>70</sup> Robert Howse, *The Legitimacy of the World Trade Organization*, 355 at 361, in Jean-Marc Coicaud & Veijo Heiskanen eds., *The Legitimacy of International Organizations* (2001); Chantal Thomas, *Constitutional Change and International Government*, 52 *Hastings Law Journal* 1 (2000).

<sup>71</sup> See Carl Schmitt, *Political Theology* (2005).

<sup>72</sup> Jürgen Habermas, *Between Fact and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996).

<sup>73</sup> For a more detailed account of literature on constitutionalizing the WTO, see Chantal Thomas, “Popular Constitutionalism” (2008) (manuscript on file with author).

than constitutionalism.<sup>74</sup> Notably, experimentalism is called for not only with respect to the principle of free trade, but also to the principle of “Special and Differential Treatment” (hereinafter “S&D”) that is so central to trade and development analysis.

Second, the state-actor focus de-emphasizes a large swath of argumentation for modes of democratization that transcend the traditional venue of interstate relations defined by formal sovereign equality. Such alternative conceptions of democratization include: greater transparency and accountability by the WTO to the global public-at-large,<sup>75</sup> broader incorporation of civil society into the WTO,<sup>76</sup> conditionality of a state’s participation in the WTO on the state’s domestic democratization,<sup>77</sup> and the bypassing of the WTO altogether to form alternative institutional configurations.<sup>78</sup>

While all of these approaches seem sympathetic and noteworthy, the traditional model of interstate democratic governance remains sufficiently out of reach in the WTO to constitute a worthy goal, and sufficiently conducive to reshaping WTO policies in the direction of egalitarian redistribution. As a consequence, proceduralist justice in the form of democratic governance presents itself as the approach that may be relatively most attainable, and most productive, in the foreseeable future (bearing in mind Keynes’s gloomy but realistic warning about the “long run.”)

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<sup>74</sup> See Roberto M. Unger, *Democracy Realized: A Progressive Alternative* (2000), 10.

<sup>75</sup> Robert Howse, *From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System*, 96 *American Journal of International Law* 94 (2002); Gráinne De Búrca, *Developing Democracy Beyond the State*, *Columbia Journal of Transnational Law* 221 (2008).

<sup>76</sup> Daniel D. Bradlow, *The times they are a-changing: Some preliminary thoughts on Developing Countries, NGOs and the Reform of the WTO*, *George Washington International Law Review* 503 (2001) (Symposium: *Global Trade Issues in the New Millennium*); Andrew T. Guzman, *Global Governance and the WTO*, *Harvard International Law Journal* 303 (2004).

<sup>77</sup> Gregory Fox & Brad Roth eds., *Democratic Governance and International Law* (2000).

<sup>78</sup> Thomas Pogge, *An Egalitarian Law of Peoples*, 23 *Philosophy and Public Affairs* 195 (1994) (arguing for a “Global Resources Dividend” or GRD).